IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	CASE NO. 1:13-CR-00003-1
	§	BROWNSVILLE, TEXAS
VERSUS	§	TUESDAY,
	§	APRIL 22, 2014
WAYNE E. BALL	§	1:59 P.M. TO 2:49 P.M.

SENTENCING

BEFORE THE HONORABLE HILDA G. TAGLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR PLAINTIFF/DEFENDANT:	SEE NEXT PAGE
COURT RECORDER:	LISA GOULDIE
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ALSO ATTENDING:

VERONICA SMITH
U.S. PROBATION OFFICER

BROWNSVILLE, TEXAS; TUESDAY, APRIL 22, 2014; 1:58 P.M.

oOo CALL TO ORDER OF THE COURT oOo

THE COURT: Good afternoon. Please be seated.

MR. COONEY: Good afternoon, Your Honor.

(Court confers with staff.)

THE COURT: At this time, the Court calls Cause Number 13-CR-3-1, United States of America versus Wayne E. Ball.

What says the Government?

MR. COONEY: J.P. Cooney, on behalf of the United States. We are prepared to go forward with sentencing, Your Honor.

THE COURT: What says the Defendant?

MR. WYNNE: Michael Wynne, for Wayne Ball. Ready to proceed, Your Honor.

THE COURT: All right. Mr. Wynne, if you'll stand in front of the Court with your client?

Good afternoon, sir.

THE DEFENDANT: Good afternoon, ma'am.

THE COURT: First of all, Mr. Wynne, have you reviewed the Presentence Report with your client?

MR. WYNNE: Yes, Your Honor.

THE COURT: And you have -- do you have objections that you're urging at this time?

MR. WYNNE: Yes, Your Honor, we objected, as I

stated, to the two-point enhancement for abuse of trust.

THE COURT: All right. For purposes of argument, sir, if you'll have a seat and, Mr. Wynne, you'll -- if you'll address the Court, Mr. Cooney will respond and then I'll rule.

MR. WYNNE: Yes, Your Honor.

As set forth in our Objection, as well as in the Reply, we -- to the Government's Response we filed the other day, the two-point enhancement for abuse of trust, although it was agreed by the Defendant and prior Counsel, it's our position it does not apply in this case as set forth in the first note under the Guidelines. That is to be used when an individual has a position of managerial discretion and most importantly they're subject to less supervision than employees whose responsibilities are primarily non-discretionary in nature.

In the *Lamb* case from the Seventh Circuit and the other cases cited, they were construing most often 2B1.1, which has a base offense level of 6. In this instance, 2J1.2, which has been applied in this matter, has a base offense level in 14.

So it's our position that in most instances, that would apply, for instance, to the sentencing of Mr. Pedraza, who was in a position of control and discretion in that particular office. If it applied in every instance, there

would be no real point to add it here.

Now, in some instances, perhaps that might be appropriate and maybe we went a little far in saying that's double-counting in every instance, but in this instance it certainly is.

Mr. Ball was still "under probation." That means when George W. Bush created the Department of Homeland Security and it was dealing with a potentially unionization of the workforce, they created these probationary positions where Mr. Ball, at the time of the events at issue here, could have been dismissed for no reason at all by Mr. Pedraza.

He was in a position where he really didn't have any discretion to say, "Yes," or "No." He'd given up his TCLEOSE commission. He couldn't go back to the Harlingen PD easily. He was making approximately $105,000, which is a substantial sum in the McAllen area. He'd been a law enforcement officer his entire career. That had been his dream. He was trying to support his teenage daughter and he was in a circumstance including, among them, we have to take into account his alcohol dependency at the time, not to stand up and contest his boss, Mr. Pedraza, who could have dismissed him for no reason. There was no appellate right to review any dismissal in the civilian service system at the time. He was still under probation.

Now later on, a government attorney simply or kind of in quasi-probation -- that was the first Mr. Ball had ever heard of anything like that. Mr. Ball was in the same position as Mr. Vargas and the other people, the other three -- two or three individuals, who received these non-prosecution agreements. I don't think they're actually written. I think they were verbal agreements. But they're all really in the same boat.

Mr. Ball did not have -- was not in a position of substantial discretion here. He was handed three reports, which Your Honor saw. He said he didn't even read them, he didn't know what they were about, just get it done, essentially to keep his job and let Mr. Pedraza do what he wanted to do and allow Mr. Ball to proceed and get over his probation.

Now, your postal employee example or your bank teller example, you know, that's a little different because those individuals, the postal system, simply can't review every item of mail that comes through. The bank officer can't review every single deposit or transaction. It's physically impossible. And so maybe in those instances, in the *Lamb* case where the postal carrier stole 1500 pieces of mail, sure, he's exercising his own individual discretion in each instance.

In this case, Mr. Ball is given three pieces of

paper he didn't write, he didn't know what they said, and told to sign his name. That's -- the position -- he -- I guess it's conceivable that Pedraza could have had anybody initial off on those, could have got somebody from the street or could have had somebody else in the office.

But this particular adjustment, especially when the base offense level is 14, it's just not appropriate to apply. And in this instance, ironically, what happened is: They frightened Mr. Ball without getting any discovery, without his lawyer offering any discovery, without challenging 1505, which doesn't even apply.

My client has pled guilty to an offense that he legally could not have committed, conspiracy to violate 1505. They moved him from a 14 to a 16, so with acceptance off, he's at a 13 where he's reliant on the Government's good graces to get him down anywhere near he'd be eligible for a probationary sentence.

Now, he's at a 14, and take off two for acceptance -- that's assuming that the Court doesn't apply the two-point adjustment -- he's at a 12. He's actually one point lower than he would have been if he'd had gone through with the Government's plan and be forced to testify, against his good conscience, against Mr. Pedraza.

So it appears as if they deliberately added this -- I'm certain it's because Garcia did not understand

it -- to put him in a position where he had to buy onto a deal that he didn't understand.

He accepts responsibility for the facts as stated, but he's not a lawyer and Mr. Garcia and Mr. Connors are not experienced in this area of the law. So we accept responsibility, but certainly don't think that this adjustment should apply.

THE COURT: In response?

MR. COONEY: Your Honor, just briefly.

And am I okay here or should I step forward?

THE COURT: Yeah, Mr. Wynne, if you'll have a seat with your client.

MR. WYNNE: Sure.

MR. COONEY: Just briefly, Your Honor. I think just two points merit response is, first, nowhere in the Guidelines is the application of the adjustment conditioned on the base offense level. There seems to be an argument that because the base offense level is 14 as opposed to 6, the two-point adjustment for abuse of public trust should not apply. I don't see anywhere in the Guidelines an application note that qualifies the application of an adjustment on the base offense level.

Second, there is -- there was an argument in the papers filed yesterday and that was alluded to today and I think that the Defense may have said that they over-argued

it, but I feel the need to address it, which is the issue about whether the two-point abuse of trust is kind of baked into the Guideline level.

And the analogy I would make is that for bribery, 2C1.1, abuse of trust by a public official -- or excuse me -- bribery by a public official or of a public official, there is a two-point kicker within that Guideline itself when the Defendant is a public official and, therefore, the abuse of trust adjustment does not apply to that because it would be a double-count.

But 1519 is not a statute that applies only to public officials or only to law enforcement agents. 1519, 1505 are obstruction statutes and so it is perfectly appropriate to apply an abuse of trust adjustment when, in circumstances such as these, the individual is a public official, a law enforcement issue who utilizes that official position to commit a criminal offense.

Importantly, the Defendant has cited no legal authority to support his position. I'm prepared to rest on my papers for the remaining legal argument and the case authority we cited, but of course, I'm prepared to answer any questions that Your Honor has about it.

THE COURT: All right.

MR. WYNNE: May I respond briefly, Your Honor?

THE COURT: Yes, go ahead.

MR. WYNNE: 2C1.1 involves cases of extortion under color of official right. That's Section 1951, the Hobbs Act, where you can have private and public extortion crimes. In fact, I've charged both of them when I was an AUSA. And on a services fraud, which until the *Skilling* decision -- and this was written before the *Skilling* decision was applicable in the private context. So you would distinguish Mr. Skilling from a public official 12 to 14.

1505 and 1519, on the other hand, are offenses that are, in general, committed only by public officials, law enforcement officers -- other persons in a position to impact a file. This has no application. This is tailored for a very different situation.

THE COURT: Okay. I'm going to overrule the objection and this is my reasoning:

First, as to the argument that the Defendant had no managerial discretion and that his responsibilities were not discretionary in nature, I disagree with that because the very nature of an investigator -- and in specific, this -- an agency that polices law enforcement officers -- has a lot of discretion in how they execute their responsibilities. They can even do surveillance. They're not under strict one, two, three, this is what you're going to do today, which is what maybe a clerk in the OIG's Office

might be considered to have stricter checklists over the things that they're supposed to do.

Here, you know, he can decide to do surveillance, he can decide to check a database, he can interview witnesses. That's a lot of discretion in his investigations. And that's what this is all about. It was: What was done in connection with a complaint or referral in connection with agents about whom there was some question as to whether their conduct was unethical, illegal or contrary to agency policy and so it was in the -- his decision to sign off on a document that he says that he did not read, but that he knew, based on prior conversations, were going to be constituting a fraud or, you know, fraudulent representations to some extent, if not entirely fraudulent.

He -- when he undertook to sign off on those documents, he was not -- he was doing something that he himself was doing in connection with the -- a decision that would impact the investigation of the officer in that Complaint Number One, which I believe that's how it was identified, a "Complaint Number One" or "Investigation Number One." And he had that position, that being again the Office of Inspector General being one that has even a higher standard of public trust than the -- just by virtue of what they do, that is, investigating claims of unethical, illegal or conduct contrary to the Rules and Regulations of the

Department of Homeland Security. They are entrusted with that responsibility.

And it's for that reason that, to me, it is clear that he did abuse his public trust by signing those documents in an attempt to make it appear to the inspectors or the auditors who were coming in to review the files to make it appear as if work had been done as is shown by -- well, there was an offer, by the way, by agreement to Defendant's Exhibit 1, which the Court admitted at a prior discussion, and the Minutes of the Court should reflect that --

MR. WYNNE: Thank you, Your Honor.

THE COURT: -- Government's Exhibit 1 -- I mean, Defendant's Exhibit 1.

MR. WYNNE: Yes. Thank you, Your Honor.

THE COURT: In any event -- let me see if I can find that.

MR. WYNNE: Do you need any copy, Your Honor?

THE COURT: No, let me get -- I think I have it here. I just -- here it is, Defendant's Exhibit 1, that being the Memorandum of Activity that was -- this exhibit consisting of -- this Defendant's Exhibit 1 consisting of 11 pages that look like they've been Bates stamped and, as such, the document that I'm referring to that he signed off on being Bates stamped US026693, US026694, and I believe the

third one is unsigned -- or the 026696 does not have a signature. But in any event, it was with the intention of having these documents that I've just referred to in Defendant's Exhibit 1 be part of the investigation in the cause number referred to in those documents.

So again, the Court overrules the Defendant's objection to the proposed finding in Paragraph 34 of the Presentence Report in -- wherein the Probation Officer recommends to the Court that pursuant to Advisory Sentencing Guideline 3B1.3, the offense level is increased by two levels because the Defendant abused a position of trust, which significantly facilitated the commission or the concealment of the offense.

(Pause in the proceedings.)

THE COURT: All right. That objection having been overruled, is there any other objection by the Defendant?

MR. WYNNE: Well, at this point, that objection having been overruled, I gather that the Defendant would be eligible for the third acceptance poin? .

THE COURT: Is the Government making such a motion?

MR. COONEY: The Government does not oppose the Defendant being awarded the third acceptance point as stated in the Plea Agreement and for the reasons I set forth in the Legal Memorandum we filed last Tuesday.

THE COURT: All right. The request is granted.

Anything else?

MR. WYNNE: Yes, Your Honor. The Defendant has also requested a downward departure for a couple of reasons, including aberrant behavior from the various submissions that we've made. Mr. Ball was an Eagle Scout, received numerous accommodations for all of his work as a law enforcement officer. We have submitted letters that I'm sure the Court has read from his prior colleagues and supervisors. And this one instance where he did not stand up to Mr. Pedraza stands in stark contrast to his entire exemplary career as a law enforcement officer.

He has already suffered a huge stigma. He's been taken out of a position that he's dreamt about all his life. There's a lot of negative publicity about him, and he's now working on an oil rig and making the best of the situation he has now to provide for himself and his family.

He has also been to his Alcoholics Anonymous meetings on a very consistent basis. I'm not sure he's missed one. Complied completely with Pretrial Services and has soberly really turned his life around and this is an opportunity for him to -- this is an opportunity for him to continue to give and to contribute to this community. No just purpose would be served by incarcerating this man at this time, when our prisons are already overcrowded and

we're considering lowering or making exceptions to the statutory minimums in several instances. This is a contributing man. He contributes to his family, contributes to society.

Along the same lines, I'm concerned about what appears to be somewhat selective prosecution and the other individuals who were not prosecuted, just Mr. Ball singled out for some reason or the other, perhaps, you know, because he had just a little bit more seniority. Maybe they needed somebody to be part of this alleged conspiracy with Mr. Pedraza, but he is left as kind of the odd man out.

Now, he -- because he made the choice partly on recommendation and discussion with me not to participate and testify because of how upset and how angry he was January and February of this year about how he'd been treated by the Government and decided that he didn't trust them to follow through with the 5K even if he did testify, was concerned they wouldn't be happy anyway with his testimony, he felt he couldn't do it, he couldn't stand up and face his family and his child having done something like that. And the important thing is what this man is like at the end of the day whenever he served and satisfied whatever punishment the Court justly imposes on him.

And, therefore, pursuant to the case I cited, the recent case from the Fifth Circuit, we'd ask the Court to

consider the substantial assistance that Mr. Ball provided in those lengthy interviews. It must have been of significant value for them to keep coming back to him repeated times interviewing him at length, providing truthful information. He spilled his guts that first meeting in February.

Some decision was made not to bring him before the Grand Jury -- not because Mr. Ball didn't want to go, he was there. In fact, they first told him that he didn't even need to bring a lawyer up. But he went anyway and he was prepared to go, he was prepared to testify. I guess beforehand they told him, "You don't need to be here before the Grand Jury, but come up anyway. You don't need a lawyer, but come." And he brought Mr. Connors, who again is not experienced in these kinds of cases.

But they continued to come back to him. He continued to cooperate, do everything they wanted until the original lawyer he struck the deal with disappeared without even saying, "Goodbye." I've dealt with cooperating Defendants before and if you're going to switch, you at least have the respect to meet the guy and say, "This other prosecutor is going to take over."

He felt he had been tricked when he went to Washington and he was very -- he was a very, very angry man when I first met him. That's not a witness the Government

wanted, but he still provided substantial assistance. He resigned immediately saving the Government money and provided all the information he possibly could and was extremely contrite. He should get substantial credit for that.

And we'd ask for a combination of those in addition to perhaps taking into account the psychiatric examination we submitted from Friday or Saturday in considering 3H1.3, his mental and emotional condition. At the time, he admittedly was drinking an average of 13 to 20 beers a day, obviously impairing his judgment. But there are a number of reasons he's turned his life around why some combination of those departures can't be granted in order to get this man to a position of some type of probationary sentence or home confinement along with a probationary sentence, that would allow him to continue his good work on the rig where he's rising to supervisory ranks and contributing to this economy and this society. Justice will not be served by sending this man to jail where, as I have observed, people who come out often end up much worse than they were when they got in.

I've gotten to know Mr. Ball extremely well the past couple of months and he's gone from someone who was very angry and bitter to someone who's contrite and accepts what he did and he wants more than anything -- he has a law

enforcement family. His dad was in law enforcement his entire career. Everybody in the Valley in law enforcement knows him.

If you want somebody to be a custodian or supervise him or provide guidance every day, you've got perfect examples sitting in the back of this courtroom. His brother's in law enforcement as well. His other brother's a practicing criminal defense attorney in McAllen. They'll keep an eye on him and keep on the straight and narrow. I'm concerned if he's sentenced to any term of incarceration, we've lost him for good and that's unfortunate really for all of us.

THE COURT: Okay. And also, in -- when I met with you in Chambers, I did ask for an agreed chronology, so I'm going to review that with you now that being -- well, first of all, this being something that I got from the Presentence Report:

That Mr. Ball began working with the Department of Homeland Security, Office of Inspector General on January 20th, 2009;

That the false documents were created sometime around or like what they say in the Indictments, on or before September the 2nd, 2011;

That the Office of Inspector General became aware of the false documentation by him and others on

September 11th -- I'm sorry, not September 11th -- September of 2011;

That his proffer agreement was executed with the advice of Counsel on February 9th, 2012;

That the District of Columbia Grand Jury convened and heard testimony from witnesses that were listed by the Government. I didn't make a complete -- I guess I did, I made a list. There was at least three names: Vargas, Castillo and Gomez testified before the Grand Jury in the District of Columbia in February of 2012;

That the individuals including those three and others received non-prosecution agreements or reached an -- or the Government agreed to not prosecute them as a result of any testimony that they would have given before the District of Columbia Grand Jury and that agreement was made in the summer of 2012;

That the target letter received by Mr. Ball was dated November the 8th, 2012;

That he resigned on November 9th, 2012;

That he entered a plea of guilty on January 17th, 2013.

Is that right?

(No audible response.)

THE COURT: Yes.

And that the trial of the supervising agent,

Pedraza, was held on the dates of March the 10th through the 14th of 2014.

And he was found guilty on that last date, I guess March 14th, 2014; is that correct?

MR. WYNNE: The -- I cannot make a representation on the date that the other three may have appeared before the Grand Jury or the date of any non-prosecution agreement, as I'm not privy to that information.

THE COURT: Well, I mean, Mr. Cooney mentioned that and unless -- he is an Officer of the Court. I'm going to accept his representation that that's when those events occurred.

MR. COONEY: That is correct, Your Honor.

If I could just make one tweak to the Grand Jury? I believe I said that it was either February or March of 2012.

THE COURT: Okay.

MR. COONEY: The time frame all being right there, I believe actually that the three that you mentioned did testify in February, but it's possible it was in the first half of March 2012.

THE COURT: Okay.

MR. WYNNE: Otherwise, that schedule is correct.

And one more thing for the Record and for purposes of possible appeal, I would like to assert the Government's

declination to file any type of 5K constitutes prosecutorial vindictiveness based on Mr. Ball's decision not to testify at trial for purpose of the Record.

THE COURT: Well, you're making that representation --

MR. WYNNE: Yes.

THE COURT: -- or that's your characterization.

MR. WYNNE: For the purposes of appeal, that I'm noting that right now.

THE COURT: All right. Then let me see.

All right. Mr. Wynne, are you going to call your client to testify in connection with your request for a departure or a variance?

MR. WYNNE: Let me consult with him just a moment, Your Honor.

THE COURT: Mr. Cooney, you'll have an opportunity to respond.

(Pause/Counsel confers with the Defendant.)

MR. WYNNE: Your Honor, my client would like to allocute, as is traditional in these instances, and I think that allocution will incorporate anything he would say during testimony.

THE COURT: All right. Then, Mr. Cooney, you may respond to his Motion for a variance or a departure.

MR. COONEY: Thank you, Your Honor.

First, with respect to the request for a departure based on aberrant behavior, the facts in this case are simply contrary to that request. As outlined in the Legal Memorandum that we filed last week, the Defendant's conduct in this case was willful and deliberate and was taken upon contemplation.

Importantly, as set forth in the *James* hearing transcript that we provided as an attachment to the -- to that Legal Memorandum and consistent with the testimony that was presented at trial, Agent Ball was approached by two other Special Agents, Vargas and Healy. This was after Pedraza had made the instruction to falsify the Reports. And they went to him to do two things:

One, plead with him to go back and approach Pedraza to try and talk him out of it because it was a bad decision to falsify the Reports;

And two, simply to seek guidance and also convey to him the risk that they were taking by doing this.

And his response to that was not to do either of those two things, but upon listening to their concerns and actively discussing with them the risks involved that they could be caught because the checks that they were intending to falsify in the Reports could objectively be checked at a later date. He responded simply by saying an expletive and "Just do it."

This wasn't aberrant or off the cuff. This was something that was actually contemplated, albeit in a short period of time, but also contemplated in the context of a 15-year career in law enforcement, not aberrant, but a willful and deliberate decision understanding the consequences of falsifying a criminal investigative report.

Moreover, as the case law I set forth in the Memorandum states: One factor that the Court should consider are efforts made to mitigate that decision in determining whether it was aberrant behavior or not. And this is where quite simply, the Government's response to the allegations regarding both the aberrant behavior departure and the substantial assistance one related to prosecutorial vindictiveness or selective prosecution -- I think this is where they come in to play -- these allegations are false and belied by every fact in this case.

And I think it's very important to set forth the timeline that Mr. Ball came in and met with prosecutors and the decision that was made to prosecute him as opposed to extend him a non-pros agreement.

And what these things show, as I'll set forth here in just a moment, is that he didn't take serious steps to mitigate at an early posture in this case, but rather he took steps to limit the damage and, for a period of time until it no longer suited him, cooperate with the

Government.

But importantly, the Defendant, in February of 2012, like virtually every other Special Agent who worked in the McAllen Field Office, was served with a Grand Jury subpoena. When served with that Grand Jury subpoena, he exercised the right that everyone has, but he obtained Counsel. His Counsel reached out to the Government. His Counsel instructed the Government to not speak with him concerning the substance of this case and, instead, negotiated a proffer agreement whereby Mr. Ball, with a limited immunity, was permitted to meet with prosecutors and he ultimately did not go into the Grand Jury.

He claims now that he always wanted to go into the Grand Jury. He seems to claim that he just somehow ended up in this proffer with the Government. In fact, it was precisely what his attorney negotiated for him recognizing that he was within the subject of the Grand Jury's investigation, that he had criminal liability and a decision was made to not place him in the Grand Jury both because he had asked for the Proffer Agreement and second, Your Honor, quite frankly, the statements that he made during the first Proffer Agreement were not fully credited and clearly did not portray the complete truth as to what occurred and the Government was aware of this for a very important reason that distinguishes this Defendant from the ones who received

non-prosecution agreements. And that distinction is that other Special Agents came forward not just when confronted by the FBI or the Department of Justice, but came forward to their own agency, reported what occurred, which ultimately led to the report to the FBI and the criminal investigation.

And other agents, upon being served with a Grand Jury Subpoena, went, testified before the Grand Jury and frankly confessed to crimes before the Grand Jury. And a decision was made to non-pros or provide a non-prosecution agreement to several of those -- or to three of those Special Agents.

But distinguishing Mr. Ball was that he did not come forward to his own agency to confess. He told a partial story when first confronted. And unlike those other agents, he never willfully just kind of went before the Grand Jury and told a complete truth. And further distinguishing him from those agents is the 15-year career in law enforcement that I mentioned, which far outlasted law enforcement careers of Edwin Castillo, Rolando Gomez and Robert Vargas.

And importantly, as set forth in the *James* hearing transcript that we attached to our Legal Memorandum and as was set forth during the trial of former Special Agent-in-Charge Pedraza, Wayne Ball actually recruited Robert Vargas, his co-conspirator in this, to the Department of Homeland

Security, Office of the Inspector General. Wayne Ball was in a position of mentorship and in a position to exercise control through his influence of Robert Vargas and through his experience with that agency and in law enforcement generally.

Those factors all distinguish him from the other Defendants and his claims of vindictiveness, of being misled, of being told things that weren't true by our prosecutors or by the FBI are simply false.

And one thing that I urge the Court to take into consideration at sentencing today that I think frankly places in context how severe the abuse of trust by a law enforcement officer who writes false reports -- how substantial that is and how substantial it was in this case is that the source of those allegations is someone who himself lied in a criminal investigative report, and that's exactly the point. Agents who involve themselves in that kind of conduct lack credibility and no longer can be sponsored as law enforcement witnesses.

Now, with respect -- I think that those issues both underpin our arguments concerning aberrant behavior and substantial assistance. But now more specifically, with respect to substantial assistance and cooperation, it is absolutely correct that we are not moving for a 5K. The Court does have authority to consider cooperation as a 3553

factor and, in fact, the case law is clear that the Court should consider it, doesn't have to give it as a mitigating factor or a non-mitigating factor, but the Court should consider it as one of the many factors under 3553.

But it's the Government's urging here that his claim of cooperation or his claim of substantial assistance should not in any way earn him some sort of lenience or a mitigating sentence under the Guidelines. We're not asking that he be punished for his decision to ultimately not cooperate, but he should not be awarded any additional acceptance of responsibility or any additional lenience that he's already receiving on the basis of his claims.

The Defense has argued that he wouldn't have been a good witness. He, in good conscience, made a decision that he couldn't cooperate anymore. He couldn't trust prosecutors because they didn't even give him a phone call to let him know that the team had changed and things of that nature. All of this scurries away from the fact of the matter.

First, it is not -- when an individual signs up for a cooperation agreement, it is not their decision about whether they'll be a good witness or about whether it's in the Government's strategic best interest for them to testify. That's up to the Government.

The Defendant -- it's not just that he refused to

testify, it may very well have been the case that the Government would never have called him at trial and, in fact, we managed to convict former Special Agent-in-Charge Pedraza without his testimony, without his cooperation.

But his Agreement requires him to meet with the Government and in those pending -- in those weeks leading up to the trial, he refused to do even that. And his claim now that prosecutors never even reached out to say, "Hey, the team has changed," that, too, is a false claim. When we had the discussion about chronology earlier, as Mr. Wynne pointed out, he was in touch with Mr. Kidd, my colleague, before the New Year in 2013.

I first joined this case, Your Honor, in about middle of November of 2013 when Mr. Gibson, the last attorney who had met with Mr. Ball, came off of the case due to a scheduling conflict and we met with Mr. Wynne for the first time in January 2014.

It's beside the point whether we ever made a phone call to him to let him know who was going to be trying the case, but it's further illustrative of him now pointing the finger at the Government for his decisions as opposed to accepting the consequences of his own. The truth is that we prosecuted Pedraza without his testimony and the assistance that he provided up to that point amounted to perhaps a paragraph in the Indictment, which I believe we ultimately

had to strike when we were before Judge Hanen for trial. That's the only way in which it affected it.

And so under those circumstances, had he met with us, had he made himself available to testify, the Government would have moved for a 5K. How substantial of one it would have been, I really can't say and I think with cooperators, there's always a degree of serendipity.

But a person cannot now come before the Court, claim substantial assistance and actually seek lenience from the Court when, in the weeks and months leading up to the trial, they refused to even make themselves available to meet. He is no longer a cooperator. He just received the benefit of the bargain that he received in the Plea Agreement, which is the 12- to 18-month sentence.

MR. WYNNE: Your Honor, may I respond very briefly?

THE COURT: Yes.

MR. WYNNE: Two pronouns Mr. Cooney used are disturbing, especially with my just having left being a federal prosecutor. He said with a smile, "We" managed to convict. No, the Jury convicts. "We" struck language in the Indictment. No, the Judge does that in the absence of the Grand Jury.

That happens when you too overly-personalize a case as a prosecutor, you're too wedded to your version of

the facts. That's not the job of the Prosecutor.

Another element that Mr. Cooney omitted was my asking for some discovery including perhaps my client's own reports of interviews or the MOAs throughout that period when we were struggling with a decision of whether to provide Mr. Ball as a potential witness at this trial. They declined even to give my guy -- to give me, as a new attorney, 302s of his own testimony. I never did that.

Why would you do that? What could you possibly have to hide? And we needed those in order to make that decision and they said, "No, you can't even get those."

Now, that tends to fuel some element of mistrust or distrust. We've read through this 302 from Valentine's Day, February 14th, 2012. It appears to be a good account of what happened. I'm not sure what's missing that would preclude an appearance before the Grand Jury, but whatever it was, wasn't so bad that it would have hindered them completely from coming back to Mr. Ball for more information three times and for potentially offering him as a witness in the Pedraza trial.

So, I mean, that would have been pretty strong impeachment material for Mr. Eastepp, a very, very good public corruption lawyer, to use against Mr. Ball if there was something so bad in that first 302.

Second, in terms of *Giglio* and his usefulness to

the Department going forward because of this unfortunate incident, if this had been handled administratively, yes, it would have to be disclosed in the event Mr. Ball were called to testify in some future case in which he was assisting a prosecutor, but that's not an insurmountable hurdle. I would have been inclined to use Mr. Ball as a witness, as a AUSA, providing this information as did *Giglio* to the Defense beforehand because I think it could be explained away, especially if further down we get in his career. It does mark him entirely off.

And furthermore, Mr. Ball never testified before this incident and there's a lot of work to be done. They can't really have it both ways. He was moving up to supervisor rank. Supervisors don't testify, only line agents testify. So you can't have him both moving up in a supervisory rank and also say that he's criminally damaged himself and rendered himself unuseful to his own agency because of this *Giglio* material that would have to be handed over.

And what's troubling here is, you know, all the cases that Judge Hanen pointed out were really awful examples of sort of police cover-ups of really unconscionable activity, all your 1505 and 1519 cases.

I'll let Mr. Ball speak for himself. He vigorously denies using profanity and he'll say that in any

discussion with Mr. Vargas later on and these are essentially uncorroborated statements by probationary officers who still have to please both the Government and their agency with the hope of getting their jobs back, so I think they perhaps should get the credit that they're due.

Something has to distinguish Mr. Pedraza's sentence, whatever it may be, from Mr. Ball's. We tried to do that with the two points, but they were very, very, very unique circumstances.

THE COURT: Well, to be honest with you, I threw you all -- especially something that I thought would inure to the benefit of your client that idea, but you all rejected it and were ready to proceed with sentencing today. Because I just felt like it was important -- as important as I felt it was for me to know the circumstances of non-prosecution agreements with other agents who might have committed the same or similar acts, it was important for the big picture to ensure that there was not a disparity in sentences that the Pedraza sentencing be conducted first. But I gave you all that option, I mean, without coming on and drawing you a picture, but you all were ready to proceed, so that's why we're here today.

MR. WYNNE: We'd be glad to recess for the -- for purposes of coming back, but my -- they had already made travel plans. My client starts on the rig tomorrow. That

would be a big disruptive. And that wasn't evident from -- to us from the Order, but we'd be glad to recess. This is an extraordinarily important matter for my client. Your Honor has already heard really about all there is to say on the case.

And I guess we'd move to recess it for that consideration.

THE COURT: Well --

MR. WYNNE: And I knew Counsel had made their plans to travel already and I didn't want to be disruptive again -- we've already had one restart -- coming from Washington.

THE COURT: Yes?

MR. COONEY: May I be heard?

Your Honor, the Government opposes that and here's why: I completely understand why the Court would perhaps want that data point and at the end of the day, the Government is not going to oppose obviously, or vehemently oppose the Court using its discretion to do that.

But the reason why I think it's unnecessary here is that we have a Defendant who stands before the Court with a clear guideline range, who has been -- who has obtained the acceptance of responsibility that he bargained for in the Plea Agreement that the Government doesn't even object to under circumstances where I think we could, and that

alone is going to separate him from Mr. Pedraza in his sentencing guideline calculation and assure that there's not a sentencing disparity.

I recognize that the Guidelines themselves are voluntary, but any variances that Mr. Pedraza would receive from the Guidelines are going to be for reasons that have little to do with the conduct and perhaps more to do with him in his individual circumstance that would not lead to any sentencing disparity between him and Mr. Ball.

THE COURT: Well, I don't have want to have any doubts in my mind about that at a -- you know, at a point when it's too late.

MR. WYNNE: There's no reason to rush, Your Honor. We'd be glad to wait.

THE COURT: I'm going to do it, I'm going to recess because I just want to have the big picture since the way I saw it, the person who had most to benefit has yet to be sentenced and you know, if -- I mean, of course, it's a double-edged sword. If the other Defendant, who had more to benefit, gets a harsh sentence, then you know, my feeling may be, well, what's sauce for the goose is sauce for the gander.

But on the other hand, if -- I mean, if the offense conduct is not what's going to distinguish them, but the other material -- well, I mean, I'll be glad to take

everything else into -- I mean, everything into account.

But I just feel like this person, who signed off on those MOAs, had a lot to lose and has lost and will continue to lose, and so has the public lost the trust in the agents that investigate other agents. But I just want to know that his sentence is going to be something commensurate with a sentence imposed by the person who was at the top of the heap or at this particular point anyway at the local level.

I don't know what, if anything, is going to happen anywhere else, but in this office is what I want for -- to be satisfied as to what has occurred because you know, I think that -- clearly, I don't feel that the Court has much reason to believe that the public needs to be protected from the Defendant from his committing other crimes in the future, but the sentence that I impose has to reflect the seriousness of his offense and it has to be something that serves as a deterrence for others who are in a position of trust especially.

But I guess what it comes down to is considering the seriousness of the crime that this man committed, I need to be satisfied that the person who was -- not -- I'm not going to say "more to blame," but had more to gain from the activity that he -- I mean, it all happened because of this person, according to what -- a review of the evidence that

I've been able to go over --

MR. COONEY: And, Your Honor, if -- I apologize if I interrupted you, but we don't -- there's no argument from the Government regarding who is more culpable here. It's the former Special Agent-in-Charge Eugene Pedraza so -- which I know doesn't affect whether we go forward today, but I just -- I know as you were outlining that, I just wanted to make clear that I'm not trying to make an argument contrary to that. He is the --

THE COURT: No, no, I'm not saying that.

MR. COONEY: -- more culpable party.

THE COURT: But like I said, you know, whether it's a signature on three documents or two documents versus, you know, the -- whatever he -- actions might have been, what it might have led to other people doing the same thing that this man has been found guilty of. Bottom of -- the bottom line for me is: I just would not want to have -- there to be a disparity in a sentence that should reflect the seriousness of the crime that this man committed versus the one that I feel that this other person should be held to a higher standard of as well, being as their supervisor.

So having said all that, I'm just going to recess and we'll -- when the other sentencing is completed, then we'll set this down for a completion of the sentencing.

MR. COONEY: May I make one recommendation with

respect to that, Your Honor? That is if it would be possible, to either after that sentencing is complete or whenever Your Honor feels appropriate, for us to simply establish a deadline for the filing of papers and whatnot --

THE COURT: Yes.

MR. COONEY: -- so that when we come, we can have a sentencing hearing and be done.

THE COURT: And, Mr. Wynne, no exclamation points ever again.

MR. WYNNE: Yes, Your Honor.

THE COURT: No name-calling or personal attacks because I will strike anything that smacks of anything other than an argument based on the law.

MR. WYNNE: Yes, Your Honor.

THE COURT: All right. Thank you.

We're in recess.

THE BAILIFF: All rise.

(Proceedings adjourned at 2:49 p.m.)

* * * * *

I certify that the foregoing is a correct transcript to the best of my ability from the electronic sound recording of the proceedings in the above-entitled matter.

/S/ MARY D. HENRY

*CERTIFIED BY THE AMERICAN ASSOCIATION OF ELECTRONIC REPORTERS AND TRANSCRIBERS, CET**D-337*

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